No. 14-1096

In the Supreme Court of the United States

JORGE LUNA TORRES, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, designates certain crimes as "aggravated felonies," "whether in violation of Federal or State law" or whether in violation of the law of a foreign country (if the term of imprisonment for the foreign conviction was completed within the previous 15 years). 8 U.S.C. 1101(a)(43). The designated crimes include any offense "described in" a number of sections of the federal criminal code, including the federal statute prohibiting malicious destruction of a building or other property through the use of fire or explosives, 18 U.S.C. 844(i), 8 U.S.C. 1101(a)(43)(E)(i).

The question presented is: Whether an alien has been convicted of arson as "described in" 18 U.S.C. 844(i) when the alien is convicted under a state statute that reaches only conduct prohibited under the federal arson and explosives statute, except that the state statute lacks the interstate-commerce element used in the federal statute as a basis for federal legislative jurisdiction.

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Cases—Continued: Page

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Cases—Continued: Page

Scheidler v. *National Org. for Women, Inc.*, 547 U.S. 9 (2006) 10, 18
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Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 48
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128 Cong. Rec. (1982):
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p. 18,815 40
p. 18,816 40
p. 19,155 40

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136 Cong. Rec. 35,621 (1990) 44

139 Cong. Rec. (1993):

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Criminal Aliens: Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 101st Cong., 1st Sess. (1989) 31, 43

Criminal Aliens: Hearing on H.R. 3872 Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary, 103d Cong., 2d Sess. (1994) 43, 45

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H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. 1 (1990) 43, 44

3 Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2003) 26

Model Penal Code (1985) 18

Offices of the U.S. Att'ys, *U.S. Attorneys' Manual: Principles of Federal Prosecution* (1997), http://www.justice.gov/usam/united-states-attorneys-manual 38, 39

John Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo. L. Rev. 295 (1986) 26, 27

Random House Webster's Unabridged Dictionary (2d ed. 2001) 17

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 30

S. Rep. No. 48, 104th Cong., 1st Sess. (1995) 42

2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* (6th ed. 2000) 23

Miscellaneous—Continued: Page

The American Heritage Dictionary of the English Language (5th ed. 2011) 9, 17

Webster's Third New International Dictionary (1986) 9, 17, 23

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 764 F.3d 152. The decisions of the Board of Immigration Appeals (Pet. App. 15a-17a) and of the immigration judge (Pet. App. 18a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2014. A petition for rehearing was denied on November 7, 2014 (Pet. App. 24a). On January 16, 2015, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March 9, 2015, and the petition was filed on that date. The petition was granted on June 29, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-44a.

STATEMENT

After records disclosed that petitioner, an alien, had been convicted of attempted third-degree arson in violation of New York Penal Law §§ 110.00 (McKinney 2009) and 150.10 (McKinney 2010), the Department of Homeland Security instituted removal proceedings against him. An immigration judge found that petitioner was removable based on his arson conviction and that the conviction qualified as an aggravated felony, making him ineligible for cancellation of removal. Pet. App. 18a-22a. The Board of Immigration Appeals (Board or BIA) affirmed, *id.* at 15a-17a, and the court of appeals upheld the Board's decision, *id.* at 1a-14a.

1. Since 1988, Congress has provided that any alien who is convicted after admission into the United States of an "aggravated felony" is deportable. 8 U.S.C. 1227(a)(2)(A)(iii); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, Subtit. J, § 7342, 102 Stat. 4469-4470. Congress has further provided that an alien convicted of an aggravated felony is ineligible for certain forms of discretionary relief from removal, including cancellation of removal, 8 U.S.C. 1229b(a)(3) and (b)(1)(C); asylum, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i); and voluntary departure, 8 U.S.C. 1229c(b)(1)(C).[1]

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[1] An aggravated felony conviction does not categorically disqualify an alien from obtaining certain other forms of protection, such as withholding of removal, see 8 U.S.C. 1231(b)(3)(B)(ii), or deferral of removal under the Convention Against Torture and Other

Congress has specified the offenses that constitute aggravated felonies for purposes of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, in 8 U.S.C. 1101(a)(43). In the most frequently used formulation in that section, Congress specified that crimes constitute aggravated felonies if they are "described in" certain provisions of the federal criminal code. See 8 U.S.C. 1101(a)(43)(D)-(E), (H)-(J), (K)(ii) and (iii), (L), (M)(ii), and (N)-(P). For instance, an offense is an "aggravated felony" if it is "described in" the section of the criminal code that prohibits possession of firearms by felons and other prohibited persons, 8 U.S.C. 1101(43)(E)(ii); "described in" a number of laws relating to the production, receipt, and distribution of child pornography, 8 U.S.C. 1101(43)(I); and, as relevant here, "described in" sections of the federal criminal code relating to arson and explosives offenses. Those sections of the criminal code include 18 U.S.C. 844(i), which makes it a crime to "maliciously damage[] or destroy[], or attempt[] to damage or destroy, by means of fire or an explosive, any building, vehicle, or other * * * property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." See 8 U.S.C. 1101(a)(43)(E).

Other subparagraphs of the aggravated-felony definition use different language. Some specify that

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Cruel, Inhuman or Degrading Treatment or Punishment, Apr. 18, 1988, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85; see 8 C.F.R. 208.16(d)(2)-(3), 1208.16(d)(2)-(3). An alien convicted of an aggravated felony is generally barred from seeking readmission following removal, but that bar does not apply if the alien obtains advance consent to apply for readmission. 8 U.S.C. 1182(a)(9)(A)(iii).

offenses are aggravated felonies if they are "defined in" particular provisions of federal law. See, *e.g.*, 8 U.S.C. 1101(a)(43)(B) and (F). Additional subparagraphs use generic labels, specifying that an offense is an aggravated felony if it is "murder, rape, or sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A), "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G), or an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. 1101(a)(43)(M)(i). And still other subparagraphs provide that crimes constitute aggravated felonies if they are offenses "relating to" specified subjects. See, *e.g.*, 8 U.S.C. 1101(a)(43)(R) ("an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year"); see also 8 U.S.C. 1101(a)(43)(Q), (S), and (T).

After listing all of these types of aggravated felonies, Congress specified that "[t]he term" aggravated felony "applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years." 8 U.S.C. 1101(a)(43).

2. Petitioner, a native and citizen of the Dominican Republic, is a lawful permanent resident of the United States. Pet. App. 2a. He was charged with arson, grand larceny, possession of burglary tools, and other offenses, in violation of New York law. Certified Administrative Record (C.A.R.) 130, 214-219. He plead-

ed guilty to attempted third-degree arson, under New York statutes that cover only conduct proscribed under the federal statute prohibiting malicious destruction of property by means of fire or explosives, 18 U.S.C. 844(i), except that the New York statutes do not require the connection to interstate commerce that is included in Section 844(i) as the basis for the exercise of the federal government's legislative jurisdiction. See N.Y. Penal Law § 150.10(1) (McKinney 2010) (making it illegal to "intentionally damage[] a building or motor vehicle by starting a fire or causing an explosion," subject to an affirmative defense for damage to a defendant's own property); *id.* § 110.00 (McKinney 2009) (prohibiting attempt). Petitioner was sentenced to one day of imprisonment and five years of probation. Pet. App. 2a; C.A.R. 127, 217-218.

Petitioner thereafter traveled to the Dominican Republic and, in 2006, sought reentry into the United States. C.A.R. 125-126. After a database query disclosed petitioner's conviction for attempted arson in violation of New York law, petitioner was charged with being inadmissible to the United States. Pet. App. 18a-19a; C.A.R. 126, 383-385; see 8 U.S.C. 1101(a)(13)(C)(v).

An immigration judge found that petitioner was inadmissible. The immigration judge also found petitioner ineligible for cancellation of removal because his arson offense was an aggravated felony. Pet. App. 19a-23a.

The Board dismissed petitioner's appeal. Pet. App. 15a-17a. Relying on two published Board opinions construing the INA's aggravated-felony definition, the Board concluded that petitioner's state arson conviction was for a crime "described in" the federal statute

prohibiting malicious destruction of property using fire or explosives. *Id.* at 16a-17a (citing *In re Bautista*, 25 I. & N. Dec. 616 (B.I.A. 2011), and *In re Vasquez-Muniz*, 23 I. & N. Dec. 207 (B.I.A. 2002) (en banc)). The Board explained that in *Vasquez-Muniz*, it had held that state or foreign convictions are for offenses "described in" a federal criminal provision, for purposes of the INA's definition of "aggravated felony," if the only difference between the state or foreign statute of conviction and the federal provision is the absence of an interstate-commerce jurisdictional element that is the basis for federal legislative jurisdiction under the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3. Pet. App. 16a-17a. Applying those principles, the Board explained, *Vasquez-Muniz* had held that an alien had been convicted of an aggravated felony when he was convicted of possessing a firearm following a felony conviction, rejecting the alien's argument that his offense was not one "described in" federal law because the federal felon-in-possession statute is within Congress's legislative jurisdiction as a result of an interstate-commerce element requiring proof that the firearm was possessed in a manner that affected commerce. *Ibid.*

The Board concluded that petitioner's case was controlled by the application of these principles. Pet. App. 16a-17a. The Board observed that its decision in *Bautista* had already applied the Board's construction of "described in" to conclude that a conviction for attempted arson in violation of the New York arson prohibitions at issue in petitioner's case qualified as an aggravated felony. The Board had noted in *Bautista* that "the sole difference between the federal arson offense set forth at 18 U.S.C. § 844(i) and the

New York state offense is that the federal offense" is brought within federal jurisdiction by an element requiring the property involved in the arson to have been "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." *Id.* at 16a (quoting *Bautista*, 25 I. & N. Dec. at 620). Respondent's arguments "d[id] not persuade" the Board that *Bautista* and *Vasquez-Muniz* "were wrongly decided." *Id.* at 17a.

3. The court of appeals denied a petition for review. Pet. App. 1a-14a. The court noted that, in accepting the Board's conclusion "that a state 'offense described in' 18 U.S.C. § 844(i) need not contain a federal jurisdictional element," *id.* at 1a-2a, it was joining the Fifth, Seventh, Eighth, and Ninth Circuits and rejecting the view of the Third Circuit, *id.* at 3a (discussing *Spacek* v. *Holder*, 688 F.3d 536 (8th Cir. 2012); *Nieto Hernandez* v. *Holder*, 592 F.3d 681 (5th Cir. 2009); *Negrete-Rodriguez* v. *Mukasey*, 518 F.3d 497 (7th Cir. 2008); *United States* v. *Castillo-Rivera*, 244 F.3d 1020 (9th Cir.), cert. denied, 534 U.S. 931 (2001); *Bautista* v. *Attorney Gen. of the U.S.*, 744 F.3d 54 (3d Cir. 2014)).

The court of appeals began by explaining that under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-844 (1984), it was required "to defer to an agency's reasonable interpretation of the statute it administers." Pet. App. 7a. Here, the court noted, the Board had concluded that the INA provisions referring to offenses that are "described in" various provisions of federal law reached state crimes that matched the federal elements precisely, except for the inclusion of an interstate-commerce jurisdic-

tional element. *Id.* at 6a-7a (discussing *Bautista* and *Vasquez-Muniz*).

The court of appeals concluded that, at a minimum, the Board's interpretation rests on a reasonable construction of the INA's "described in" language. It noted in this regard that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." Pet. App. 8a (citation omitted). Here, the court explained, the aggravated-felony provisions referring to crimes "described in" certain sections of federal law were paired with other aggravated-felony provisions using different formulations, including provisions that referred to crimes "defined in" federal law. *Id.* at 8a-9a. The court joined the Fifth, Seventh, Eighth and Ninth Circuits in concluding "that 'described in' is the broader standard, and that an offense identified in this way need not reproduce the federal jurisdictional element to have immigration consequences." *Id.* at 9a-10a.

The court of appeals disagreed with the Third Circuit—the lone court taking a contrary view—which had concluded that "described in" was naturally read as *narrower* than "defined in," so that "state offenses 'described in' a federal statute must reproduce the federal jurisdictional element to constitute aggravated felonies, while offenses 'defined in' a federal statute need not." Pet. App. 9a (citing *Bautista*, 744 F.3d at 59).

The court of appeals also noted that the Board had found other features of the statute provided support for its textual reading, though the court concluded

that those features did not "inexorably" compel the Board's reading of the statute. Pet. App. 10a-11a.

Because the court of appeals found "persuasive the BIA's reading of the relevant statutory provisions as set forth in *Matter of Bautista* and might well adopt it [itself] were [it] not constrained to do so in any event by *Chevron*," the court "defer[red] to the BIA's 'permissible construction'" of the INA's aggravated-felony provisions. Pet. App. 12a (footnote and citation omitted).

SUMMARY OF ARGUMENT

The portions of the definition of "aggravated felony" under the Immigration and Nationality Act (INA) that apply to offenses "described in" specified sections of the federal criminal code include convictions under state and foreign statutes that are equivalent to the cited federal provisions in every respect except for an interstate-commerce element that is the basis for federal legislative jurisdiction. This construction—adopted by the Board and by all courts of appeals but one—flows from the statutory text, structure, and context. And unlike petitioner's reading, it aligns the statute with a coherent objective—enabling swift removal of aliens who commit serious crimes, regardless of the jurisdiction of prosecution.

A. 1. The Board adopted the best reading of the statutory language. To "describe" a concept is to convey its central features—its "outline," *Webster's Third New International Dictionary* 610 (1986) (*Webster's Third*), or "idea," *The American Heritage Dictionary of the English Language* 490 (5th ed. 2011) (*American Heritage Dictionary*). The central features of criminal offenses are their substantive elements, not the jurisdictional elements that "may limit,

but * * * will not primarily define, the behavior that the statute calls a 'violation' of federal law." *Scheidler* v. *National Org. for Women, Inc.*, 547 U.S. 9, 18 (2006). Thus, across many doctrines, when courts are called upon to determine whether one sovereign's offense is the equivalent of another's, they set jurisdictional elements aside—a result that the "described in" language indicates that Congress intended here.

2. This prevailing construction of the paragraphs of the aggravated-felony definition that use "described in" is supported by surrounding statutory language. Congress juxtaposed these provisions with narrower "defined in" language in other aggravated-felony provisions. Petitioner's interpretation would fail to give those terms different meanings, because the natural meaning of "defined in" requires exact correspondence. And while petitioner argues that Congress could have used generic labels (such as "arson") if it intended the aggravated-felony definition to include state crimes that did not have a jurisdictional element tied to interstate commerce, Congress could reasonably have concluded that cross-references to specific sections of the federal criminal code conveyed its meaning with respect to some offenses more precisely than a generic label would. The aggravated-felony provision at issue in petitioner's case demonstrates this point, because Congress's incorporation of all crimes "described in" several sections of 18 U.S.C. 844 conveys a meaning both broader and more precise than a reference to generic "arson."

3. Ratification principles provide further support for this construction. In 2003, Congress enacted a new "described in" provision within the aggravated-felony statute, and left intact the many existing "de-

scribed in" provisions. When Congress did so, federal provisions addressing offenses "described in" federal criminal statutes had been uniformly construed to reach state crimes that mirrored all the substantive elements of the federal statutes, but lacked a jurisdictional element. Congress's carrying forward of the "described in" language under these circumstances is evidence that Congress wished to carry forward the then-uniform interpretation of the "described in" phrase.

4. The prevailing interpretation of "described in" as used in the INA's aggravated-felony definition construes the text in line with Congress's stated objective: to enable swift removal of aliens who commit serious crimes, "whether in violation of Federal or State law" or, subject to a recency requirement, foreign law. 8 U.S.C. 1101(a)(43). Petitioner's construction would disserve that objective, and give the aggravated-felony provisions a "limited and * * * haphazard" scope. *Nijhawan* v. *Holder*, 557 U.S. 29, 40 (2009). Under petitioner's view, the aggravated-felony provisions would exclude state and foreign convictions for many of the gravest aggravated felonies—such as selling a child for use in child pornography; receiving explosives for use in injuring, killing, or intimidating another; and receiving a ransom for the release of a kidnapped person—because of the interstate-commerce jurisdictional element in the relevant federal statutes. At the same time, on petitioner's view, the statute would reach state offenses that are less grave by any measure, such as possessing a firearm not identified by a serial number or failing to appear before a court on a felony charge that carried a possible term of at least two years' imprisonment.

Petitioner cannot offer any sensible explanation for the patchwork that his reading produces. Petitioner misunderstands the role of jurisdictional elements in positing that Congress regarded convictions under state and foreign laws paralleling the federal statutes regarding child pornography, arson and explosives, ransoms, and other offenses as materially less serious than their federal counterparts because convictions can be obtained in state and foreign courts without establishing a connection to interstate or foreign commerce. Congress's inclusion of a commerce element in federal statutes concerning these serious crimes does not reflect an idiosyncratic view that persons who commit such crimes with a connection to commerce are especially culpable, but rather represents the link Congress made between the crime involved and the exercise of its enumerated powers. Petitioner's view is particularly implausible because many of the state and foreign convictions that petitioner would exclude are for conduct that would very likely involve some connection to commerce, such as distributing child pornography, possessing firearms, and transmitting extortion or ransom demands. The absence of an interstate-commerce showing when these offenses are prosecuted under state and foreign statutes simply reflects that state and foreign governments, which have plenary police powers, have no occasion to require findings regarding commerce in order to establish their jurisdiction.

There likewise is no merit to petitioner's suggestion that the "described in" provisions were designed to exclude state and foreign convictions on the theory that they generally involve far less culpable underlying conduct than federal convictions. When Congress

wanted to capture only particularly serious forms of an offense in the aggravated-felony provisions, it did so explicitly—by reaching, for instance, only those theft or burglary offenses for which the defendant received a term of imprisonment of one year or more; only those frauds that caused a loss to victims of at least $10,000; and only those money laundering crimes that involved at least $10,000. In contrast, using state or foreign prosecution as a proxy for lesser gravity would make little sense. States are the sovereigns in the federal framework with principal responsibility for punishing crimes—including the most serious offenses. And in the specific context of arson and explosives crimes, Congress expressly directed that federal prosecution was appropriate only if state officials lacked resources or authority to address the underlying crimes. Similarly, foreign prosecution makes no sense as a proxy for offense seriousness—because an offense's having been prosecuted by a foreign sovereign is likely to reflect nothing more than that the crime occurred outside the United States. Further, petitioner offers no reason why a Congress that expressly sought to reach state and foreign crimes would have used the identity of the prosecuting sovereign as a proxy for offense seriousness only with respect to certain federal crimes having interstate-commerce elements.

5. The legislative history provides additional support for the conclusion that Congress intended the meaning that flows from the text and context of the "defined in" provisions. Members of Congress consistently explained that the aggravated-felony provisions were designed to apply to aliens convicted of particularly serious offenses in state courts. They

reinforced that intent when Congress amended the statute to expressly provide that state and foreign offenses were included. That amendment was intended to ratify a Board decision that had eschewed distinctions on the basis of whether a conviction was accomplished under state or federal law. And when Members of Congress explained the addition of crimes to the aggravated-felony definition, they routinely described those provisions as extending aggravated-felony treatment to particular areas of substantive misconduct—like "child pornography." They never suggested that such misconduct would be covered only if in violation of federal law.

B. 1. Any ambiguity concerning the meaning of the aggravated-felony provisions in the INA should be resolved based on deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Board is entitled to deference to its interpretation of the INA, because Congress has charged the Attorney General with administration and enforcement of the statute in removal proceedings, and the Attorney General has delegated her authority to the Board. Petitioner is mistaken in arguing that deference is unwarranted because the INA attaches criminal penalties to certain immigration misconduct, when committed by (or with respect to) those who are inadmissible or removable on numerous grounds—including grounds that relate to aggravated-felony convictions. This Court's precedents are not consistent with petitioner's argument that agencies are stripped of deference in their construction of ambiguous terms whenever those terms might have criminal implications—a principle that, if accepted, would se-

verely undermine the administration of the immigration laws.

2. The Board's interpretation of the aggravated-felony provision is, at minimum, a reasonable one. As all courts but one have agreed, there is ample support for the Board's view of the statute. The Board reasonably concluded that petitioner's reading was not the best when the statutory language is read in context, and that it would produce unreasonable outcomes. Although petitioner objects to particular sentences in the Board's opinion as overstatement, his objections misunderstand the Board's analysis.

ARGUMENT

UNDER THE AGGRAVATED-FELONY DEFINITION IN THE IMMIGRATION AND NATIONALITY ACT, ATTEMPTED ARSON IN VIOLATION OF NEW YORK LAW IS AN OFFENSE "DESCRIBED IN" 18 U.S.C. 844(i), BARRING ATTEMPTED MALICIOUS DESTRUCTION OF PROPERTY USING FIRE AND EXPLOSIVES

The INA defines certain offenses as aggravated felonies, "whether in violation of Federal or State law" or in violation of foreign law (in cases where the alien's foreign term of imprisonment was completed within the previous 15 years). 8 U.S.C. 1101(a)(43). Those aggravated-felony offenses include the crimes "described in" a number of sections in the federal criminal code, including, as relevant here, the crime "described in" the federal statute prohibiting malicious destruction of property by use of fire or explosives, 18 U.S.C. 844(i). See 8 U.S.C. 1101(a)(43)(E).

As the Board concluded, and as courts of appeals uniformly held until a single recent decision, a state statute contains the crime "described in" a federal provision when the state statute is identical to the

federal provision in every respect except for the lack of an interstate-commerce element that is the basis for federal legislative jurisdiction. Because petitioner was convicted of attempted arson under a New York statute that is equivalent to the federal arson statute in all respects except for its omission of such a jurisdictional element, petitioner was convicted of an aggravated felony.

A. The Prevailing Construction Of The Aggravated-Felony Definition Is Supported By Text, Structure, and Context

Given their most natural reading, the provisions of the INA's aggravated-felony definition referring to crimes "described in" particular federal statutory sections encompass state offenses that mirror the referenced federal offenses in all respects except for an interstate-commerce element that is the basis for federal legislative jurisdiction. The aggravated-felony provisions thereby enable the swift removal of aliens convicted of the most serious crimes, regardless of the jurisdiction of conviction. Petitioner's contrary approach deviates from the most natural reading of the statutory text, and would give the aggravated-felony provisions the "limited and * * * haphazard" scope that this Court has previously found Congress would not have intended them to have. *Nijhawan* v. *Holder*, 557 U.S. 29, 40 (2009).

1. The statutory text supports the Board's reading

The interpretation of the aggravated-felony provision adopted by the Board and decisively favored by the courts is the most natural reading of the statutory language—particularly against a legal backdrop that

has long distinguished between substantive and jurisdictional elements of criminal offenses.

The text of the aggravated-felony definition that reaches state and foreign crimes "described in" specified sections of the federal criminal code is most naturally read to reach state and foreign crimes that are substantively equivalent to the specified federal offenses, and differ only in that they lack an interstate-commerce element that supports federal jurisdiction. Dictionaries define "describe" as "[t]o convey an idea or impression of," *Espinal-Andrades* v. *Holder*, 777 F.3d 163, 168 (4th Cir. 2015), petition for cert. pending, No. 14-1268 (filed Apr. 22, 2015) (brackets in original) (quoting *American Heritage Dictionary* 490); "to mark out: trace or traverse the outline of"; "to represent" an idea or a thing through a different medium," *Webster's Third* 610; or to "denote" or "represent," *Random House Webster's Unabridged Dictionary* 538 (2d ed. 2001). Thus, describing entails conveying central features in a different context, not precise replication. See *United States* v. *Beasley*, 12 F.3d 280, 283 (1st Cir. 1993) (Breyer, J.) (explaining that a federal drug statute "describe[s] behavior commonly called 'drug trafficking,'" including "such activities as the making, importing, exporting, distributing, or dispensing, of drugs," so that state statutes that "criminalize some[] or all, of these same activities * * * would create 'an offense *described in*' the federal statute") (quoting 28 U.S.C. 994(h)(2)).

The application of the "described in" language to offenses with jurisdictional elements is straightforward, because it is settled that jurisdictional elements are not substantive or material elements of an offense. As this Court has put it, interstate commerce ele-

ments are "terms of art" in federal statutes, whose purpose is to "connect[] the congressional exercise of legislative authority with the constitutional provision (here, the Commerce Clause) that grants Congress that authority."[2] *Scheidler* v. *National Org. for Women, Inc.*, 547 U.S. 9, 17-18 (2006) (citing *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995), and *Russell* v. *United States*, 471 U.S. 858, 859 (1985)). Thus, "jurisdictional language may limit, but it will not primarily define, the behavior that the statute calls a 'violation' of federal law." *Id.* at 18. The Model Penal Code draws the same line, distinguishing between "material elements" that define the *malum prohibitum* and jurisdictional elements that merely establish a sovereign's power to regulate. Model Penal Code § 2.02, at 227 (1985) (defining "material element[s]" to include all "matters relating to the harm or evil sought to be prevented by the law defining an offense," and exclude "[f]acts that relate to * * * jurisdiction, venue or limitations").

Because jurisdictional elements are not substantive features of the offenses set out in criminal statutes, courts often set jurisdictional elements aside under statutes that call for comparison of state and federal crimes. The federal three-strikes statute, for instance, increases the sentence of persons convicted of serious violent felonies. "[S]erious violent felony" is defined, using language parallel to the aggravated-felony definition, to include any "Federal or State

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[2] Legislative jurisdiction, involving Congress's power to regulate certain conduct, is thus distinct from subject-matter jurisdiction, which involves "the courts' statutory or constitutional *power* to adjudicate the case." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) (citation omitted).

offense, by whatever designation and wherever committed, consisting of murder (as *described in* section 1111); manslaughter other than involuntary manslaughter (*as described in* section 1112); assault with intent to commit murder (*as described in* section 113(a)); * * * aggravated sexual abuse and sexual abuse (*as described in* sections 2241 and 2242); abusive sexual contact (*as described in* sections 2244 (a)(1) and (a)(2)); * * * aircraft piracy (*as described in* section 46502 of Title 49); robbery (*as described in* section 2111, 2113, or 2118); [and] carjacking (*as described in* section 2119)." 18 U.S.C. 3559(c)(2)(F)(i) (emphases added). Courts have uniformly interpreted this provision to reach offenses under state statutes that parallel the relevant federal provisions, even if the state statutes lack a federal jurisdictional element. See *United States* v. *Rosario-Delgado*, 198 F.3d 1354 (11th Cir. 1999) (per curiam); *United States* v. *Wicks*, 132 F.3d 383, 386-387 (7th Cir. 1997), cert. denied, 523 U.S. 1088 (1998); *United States* v. *Dittrich*, 100 F.3d 84, 86 (8th Cir. 1996), cert. denied, 520 U.S. 1178 (1997); *United States* v. *Farmer*, 73 F.3d 836 (8th Cir.), cert. denied, 518 U.S. 1028 (1996); see also *United States* v. *Ferguson*, 211 F.3d 878, 882 n.1, 886 (5th Cir.) (without analysis), cert. denied, 531 U.S. 909 (2000); *United States* v. *Kaluna*, 192 F.3d 1188 (9th Cir. 1999) (not disputed by parties), cert. denied, 529 U.S. 1056 (2000).

Similarly, this Court has explained that jurisdictional elements are properly set aside when comparing state and federal laws in applying the Assimilative Crimes Statute, 18 U.S.C. 13(a), under which assimilation of a state offense is appropriate only if the same acts or omissions are not punishable by federal stat-

ute. *Lewis* v. *United States*, 523 U.S. 155, 165 (1998) ("[I]t seems fairly obvious that the Act will not apply where both state and federal statutes seek to punish approximately the same wrongful behavior—where, for example, differences among elements of the crimes reflect jurisdictional, or other technical, considerations, or where differences amount only to those of name, definitional language, or punishment."); *id.* at 183 (Kennedy, J., dissenting) ("[A] jurisdictional element need not by itself allow assimilation, if all substantive elements of the offenses are identical.").

Similar principles apply to determinations of whether offenses under U.S. and foreign law are the same. Extradition treaties often require dual criminality, under which "the act done on account of which extradition is demanded must be considered a crime by both parties." *Wright* v. *Henkel*, 190 U.S. 40, 58 (1903); see *Collins* v. *Loisel*, 259 U.S. 309, 312 (1922). Courts applying this test have found dual criminality when a federal statute contains an interstate-commerce element that has no counterpart in foreign law, explaining that the interstate-commerce element is "but a jurisdictional element," while the "substantive crime" remains the same. *United States* v. *Herbage*, 850 F.2d 1463, 1466 (11th Cir. 1988), cert. denied, 489 U.S. 1027 (1989); see *Ross* v. *United States Marshal for E. Dist. of Okla.*, 168 F.3d 1190, 1196 (10th Cir. 1999) (use of mails is "merely a jurisdictional requirement which makes the underlying crime federal in nature"); *Emami* v. *United States Dist. Ct. for N. Dist. of Cal.*, 834 F.2d 1444, 1450 (9th Cir. 1987) ("It does not matter that the German [fraud] statute does not contain the jurisdictional element of use of the mails" because "[t]he substantive conduct each statute

punishes is functionally identical."). A number of extradition treaties make this point expressly. See, *e.g.*, *United States* v. *Sensi*, 879 F.2d 888, 894 (D.C. Cir. 1989) (noting dual-criminality finding was "bolstered" by treaty provision that "when United States Federal jurisdiction is based upon interstate transport or transportation or the use of the mails or of interstate facilities, these aspects [are] jurisdictional only") (citation omitted).

Jurisdictional elements likewise are not ordinarily regarded as substantive or material with respect to mens rea. "[C]ourts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Flores-Figueroa* v. *United States*, 556 U.S. 646, 652 (2009). And even when a statute contains no express mental-state requirement, courts generally imply one, applying the principle that "a defendant generally must 'know the facts that make his conduct fit the definition of the offense.'" *Elonis* v. *United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *Staples* v. *United States*, 511 U.S. 600, 608 n.3 (1994)). Despite these general principles, however, courts have consistently held that because an interstate-commerce element is "purely jurisdictional" rather than "substantive," a defendant need not know the facts that establish an interstate-commerce element. *United States* v. *Blackmon*, 839 F.2d 900, 907 (2d Cir. 1988); see *United States* v. *Blassingame*, 427 F.2d 329, 330 (2d Cir. 1970) ("The use of interstate communication is logically no part of the crime itself. It is included in the statute merely as a ground for federal jurisdiction."), cert. denied, 402 U.S. 945 (1971); *United States* v. *Squires*, 581 F.2d 408, 410 (4th Cir. 1978) (inter-

state-commerce element is "merely jurisdictional" and "not material to the substantive offense"); see also, *e.g.*, *United States* v. *Jinian*, 725 F.3d 954 (9th Cir. 2013); *United States* v. *Lindemann*, 85 F.3d 1232, 1241 (7th Cir.), cert. denied, 519 U.S. 966 (1996); *United States* v. *Bryant*, 766 F.2d 370, 375 (8th Cir. 1985), cert. denied, 474 U.S. 1054 (1986).[3]

2. The contrasting language of the aggravated-felony subsections supports the Board's reading

a. The construction of the relevant paragraphs of 8 U.S.C. 1101(a)(43) that preserves the established distinction between substantive and jurisdictional elements is not only consistent with the meaning of "described in" when considered alone, but also is strongly supported by the surrounding statutory language. The paragraphs in 8 U.S.C. 1101(a)(43) that refer to crimes "described in" particular federal statutory sections are juxtaposed with other provisions in Section 1101(a)(43) that refer to crimes "defined in" other federal statutory sections. See 8 U.S.C. 1101(a)(43)(B) and (C). "Defined in" is the more restrictive of these two terms, as the Second, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits have con-

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[3] This legal backdrop demonstrates the error in petitioner's assertion (Br. 17) that the prevailing construction of "described in" in 8 U.S.C. 1101(a)(43) creates a "Pandora's box[]," by construing paragraphs in the aggravated-felony definition to reach "not just the designated [federal] offenses but a nebulous penumbra of similar offenses." Because the "described in" language captures a distinction between substantive or material elements and purely jurisdictional ones that courts have drawn without difficulty for years, it is unsurprising that when courts construed the three-strikes and aggravated-felony provisions to track the same distinction, their decisions did not in fact give rise to an "awful lot of litigation." Pet. Br. 18.

cluded, see Pet. App. 9a; see also *Espinal-Andrades*, 777 F.3d at 168, because "defined in" is naturally read to require a precise match between provisions. See *Webster's Third* 592 (stating that "define" means "to determine the precise signification of"); *Black's Law Dictionary* 515 (10th ed. 2014) (*Black's*) ("To state or explain explicitly," "To fix or establish (boundaries or limits)," "To set forth the meaning of (a word or phrase)."). The construction of the term "described in" adopted by the Board and all but one court of appeals thus draws additional support from statutory context, under the principle that "[t]he use of different terms within related statutes generally implies that different meanings were intended." *United States* v. *Bean*, 537 U.S. 71, 76 n.4 (2002) (quoting 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 46:06, at 194 (6th ed. 2000)).

Petitioner's reading of Section 1101(a)(43) would violate that interpretive principle. He construes "described in" to convey the same meaning that "defined in" conveys—treating provisions of federal law as "fix[ing] or establish[ing]" the boundaries of, "set[ting] forth the meaning of," *Black's* 515, or "determin[ing] the precise signification of," *Webster's Third* 592, aggravated-felony categories, irrespective of whether "described in" or "defined in" is used. Petitioner seeks to account for the identical meaning he accords these two different terms by asserting (Br. 18-20) that Congress used "defined in" only with respect to "definitions" in federal statutes. But ordinary federal criminal statutes are themselves definitions, in that they define or specify the elements of criminal offenses. Accordingly, federal law often speaks of crimes or offenses "defined in" federal criminal provi-

sions. See, *e.g.*, 18 U.S.C. 1956(h); 18 U.S.C. 2113(d); 18 U.S.C. 924(c)(5); 18 U.S.C. 2320(h)(1); 18 U.S.C. 2113(e). For example, the federal drug statutes make it illegal for any person to attempt to commit or conspire to commit "any offense defined in" the federal provisions outlawing importation and exportation of controlled substances. 21 U.S.C. 963. A provision establishing mandatory minimum sentences for violent crimes against children applies "if the crime of violence is kidnapping (as defined in section 1201) or maiming (as defined in section 114)." 18 U.S.C. 3559(f)(2). And in one particularly striking example for present purposes, Congress paired "defined in" with the arson and explosives provisions in Section 844—squarely contradicting petitioner's suggestion that "defined in" could not be paired with arson and explosives offenses in Section 1101(a)(43)(E)(i) because the arson and explosives statutes do not set out "definitions." See 18 U.S.C. 844(n) (establishing penalties applicable to "a person who conspires to commit any offense defined in this chapter").[4]

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[4] The Board's interpretation of the statutory text draws additional support from an INA provision that prohibits the early removal of aliens held in state custody for offenses that are "described in" particular federal provisions. 8 U.S.C. 1231(a)(4)(B)(ii). Section 1231(a)(4)(B)(ii) permits the Attorney General to remove "an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien" requests the removal, and, *inter alia*, "the alien is confined pursuant to a final conviction for a nonviolent offense (*other than an offense described in section 1101(a)(43)(C) or (E) of this title*)." *Ibid.* (emphasis added). On the prevailing reading of 8 U.S.C. 1101(a)(43)(E), this provision in 8 U.S.C. 1231(a)(4)(B)(ii) makes sense: It ensures that aliens who have been convicted under state law of an array of gun and explo-

b. Petitioner argues (Br. 20-21) that "if Congress had intended to include" all state offenses that match the substantive elements of federal arson in the aggravated felony definition, it "would have used the generic term 'arson,' rather than stating 'an offense described in' 18 U.S.C. § 844(i)." That argument is mistaken. Just because Congress determined that a generic label most accurately captures *some* crimes it wanted to include in the definition of aggravated felony does not mean that Congress must have concluded that generic labels best capture *every* such crime. See *Negrete-Rodriguez* v. *Mukasey*, 518 F.3d 497, 503 (7th Cir. 2008) ("[I]t does not follow that, because Congress has defined *some* crimes in general terms, it had to define *all* crimes in general terms in order for the offense's state law counterpart to be included within the definition of an 'aggravated felony.'"). Instead, Congress could reasonably conclude that references to substantive offenses described in other federal statutes captured more precisely other crimes it wanted to include.

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sives offenses are not removed before they complete their sentences. It bars, for instance, early removal of persons held in state custody based on convictions for transactions involving stolen explosives; shipping explosives to felons or other prohibited persons; making bomb threats; unlawfully possessing a firearm as a felon or other prohibited person; and transferring a gun for use in a felony. On petitioner's view (Br. 31), however, this reference to Section 1101(a)(43)(E) would not make much sense. It would allow removal of aliens who committed those many serious firearms and explosives offenses before their sentences were complete, while barring early removal only of aliens with state convictions for the handful of state gun crimes the federal counterparts of which lack an interstate-commerce element—offenses such as possessing a firearm with no serial number, 26 U.S.C. 5861(i), or an unlawfully imported gun, 26 U.S.C. 5861(k).

The subparagraph of Section 1101(a)(43) at issue in petitioner's case illustrates this point, because Congress's incorporation of all offenses "described in" specified provisions of 18 U.S.C. 842 and 844 conveys a meaning that is both broader and more precise than a reference to generic "arson." First, as the court of appeals noted, that subparagraph sweeps more broadly than generic "arson," because it incorporates various explosives-related offenses as well. Pet. App. 9a & n.2; see 8 U.S.C. 1101(a)(43)(E)(i). Thus, petitioner's proposed generic formulation would have left out much of what is covered by the language Congress enacted. See Pet. Br. 23 n.7 (conceding that the aggravated-felony provision at issue here "include[s] several explosives offenses [that are] in 18 U.S.C. § 844 other than arson").

Further, Congress's incorporation of arson crimes through statutory cross-reference achieves greater clarity than would have been achieved through reference to "generic 'arson'"—a term that could pose interpretive difficulties. The meaning of "arson" has changed significantly over time and still varies today among jurisdictions. At common law, arson required "the malicious burning of the dwelling house of another." 3 Wayne R. LaFave, *Substantive Criminal Law* § 21.3, at 239 (2d ed. 2003). But model enactments—especially the Model Arson Law and the Model Penal Code—have substantially expanded the narrow common-law rule, and their somewhat different proposals for the offense's scope have been adopted to varying degrees in different States. See generally John Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo. L. Rev. 295 (1986). In the wake of those reform efforts, some of the limits of common-law arson survive

almost nowhere (such as the requirement that the property destroyed by an arsonist be a "dwelling"), and there is substantial disagreement regarding other elements, including whether the property burned must belong to a person other than the arsonist, see *id.* at 387-399, 407, whether an arsonist may cause damage through use of explosives or only through fire, *id.* at 364, whether inchoate crimes are covered, *id.* at 398-403, and what mens rea applies, *id.* at 403-436. By referring to Section 844(i), Congress avoided those ambiguities in the meaning of the generic term.

The provisions elsewhere in federal law petitioner cites (Br. 20-23) that do refer to "arson" standing alone reinforce this point, because they demonstrate that such references are not consistently understood as referring to arson as set out in Section 844(i). For instance, the reference to "arson" in the Major Crimes Act applicable in Indian country, 18 U.S.C. 1153, has been understood as a reference to the distinct provision, 18 U.S.C. 81, concerning arson in federal enclaves. See *United States* v. *Doe*, 572 F.3d 1162, 1164 (10th Cir. 2009), cert. denied, 559 U.S. 974 (2010); *United States* v. *Auginash*, 266 F.3d 781, 783 (8th Cir. 2001). The reference to "arson" petitioner identifies in 18 U.S.C. 1111(a) likewise has been understood as a reference to Section 81. *United States* v. *Bedonie*, 913 F.2d 782 (10th Cir. 1990), cert. denied, 501 U.S. 1253 (1991). And the references to "arson" on which petitioner relies in 18 U.S.C. 1961(1)(A) have been understood as an incorporation of arson however that crime is defined in the law of a particular State. See, *e.g.*, *United States* v. *Zizzo*, 120 F.3d 1338, 1356 (7th Cir.), cert. denied, 522 U.S. 998 (1997); *United States* v. *Anderson*, 782 F.2d 908, 917 (11th Cir. 1986). Those

references thus disprove petitioner's assertion that a reference to the "generic term 'arson'" would have been an effective substitute for a reference to the substantive arson and explosives offenses "described in" 18 U.S.C. 844(i).

More broadly, consideration of the aggravated-felony definition as a whole underscores how statutory cross-references often enhance precision. Section 1101(a)(43) includes many crimes other than the arson and explosives offenses in Section 844(i) that cannot easily be described using generic labels. See *Negrete-Rodriguez*, 518 F.3d at 503 (noting that many offenses "are not susceptible to being easily described in general terms," such as the firearms-related offenses in Sections 922(g)(4) and (*o*)). Petitioner's suggestion that Congress would have used a generic label in any case in which it wanted to reach state crimes notwithstanding the absence of a jurisdictional element is particularly implausible given the existence of those federal crimes, which illustrate that it often makes more sense to describe "offenses by reference to the statutory provision where they were located rather than conjuring up an awkward general descriptor, or having to recopy several parts of a statutory scheme." *Ibid.*

c. Petitioner observes (Br. 24) that Congress could have used other language that might have been more explicit as to the status of jurisdictional elements. But that point does not aid petitioner. Congress could have expressly addressed the status of jurisdictional elements in either direction—by expressly stating that such elements are to be considered, or by expressly stating that they are not relevant. Cf. *United States* v. *Rivera*, 996 F.2d 993, 995 (9th Cir. 1993)

(noting in interpreting similar statutory language that it was "equally true" that Congress could have expressly said that "predicate offenses are limited to federal law" and that Congress "could have said predicate offenses are [covered] whether they violate state or federal law"). To be sure, in two entirely different provisions, Congress has expressly addressed jurisdictional elements and has clarified that they are irrelevant to determining whether a state offense is covered under some statutory provision. See 18 U.S.C. 3142(e)(2)(A) and (f)(1)(D). But those two unrelated provisions do not shed light on the meaning of the distinct cross-references in the INA's comprehensive aggravated-felony definition in 8 U.S.C. 1101(a)(43). Nor do those two provisions generate the type of interpretive problem from which petitioner's view suffers by assigning the same meaning to "defined in" and "described in." While there is a "well-established canon of statutory interpretation that the use of different words or terms *within a statute* demonstrates that Congress intended to convey a different meaning for those words," *Spencer Enterprises, Inc.* v. *United States*, 345 F.3d 683, 689 (9th Cir. 2003) (emphasis added; citation omitted), there is no such canon as to different words in such unrelated statutes, enacted years apart by different Congresses.

3. Congress's enactment of additional "described in" language in 2003 further supports the Board's construction

Congress's amendment of the aggravated-felony definition at a time when "described in" provisions were uniformly understood to reach state offenses without regard to jurisdictional elements provides additional support for the meaning of "described in"

that flows from the text and context of 8 U.S.C. 1101(a)(43). "If a word or phrase has been given a uniform interpretation by inferior courts , a later version of that act perpetuating the wording is presumed to carry forward that interpretation." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012)); see, *e.g.*, *Bragdon* v. *Abbott*, 524 U.S. 624, 644-645 (1998) (finding ratification based on uniform administrative and judicial precedent).

That principle applies here. In 2003, Congress amended the aggravated-felony provision, leaving in place existing paragraphs incorporating all offenses "described in" specified federal criminal statutes, and adding a new paragraph reaching offenses "described in" additional provisions relating to human trafficking and similar acts. See Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(b)(5), 117 Stat. 2879; 8 U.S.C. 1101(a)(43)(K)(iii). At the time Congress did so, the "described in" phrasing was uniformly understood to reach state offenses that mirror federal provisions' substantive elements, despite the omission of a federal jurisdictional element. Courts had uniformly so held in the context of the federal three-strikes provision, which provided enhanced sentences based on crimes "described in" particular provisions of federal law. See *Rosario-Delgado*, 198 F.3d at 1357; *Wicks*, 132 F.3d at 386-387; *Dittrich*, 100 F.3d at 86; *Farmer*, 73 F.3d at 842-843; *Ferguson*, 211 F.3d at 882 n.1, 886; *Kaluna*, 192 F.3d at 1191-1192. That approach had also been applied to the "described in" language in the INA's aggravated-

felony provision, with the Ninth Circuit doing so in *United States* v. *Castillo-Rivera*, 244 F.3d 1020, cert. denied, 534 U.S. 931 (2001), and the Board doing so en banc, after vacating an earlier Board opinion, in *In re Vasquez-Muniz*, 23 I. & N. Dec. 207, 212-213 (B.I.A. 2002). No court had adopted a contrary approach. Congress's carrying forward the "described in" language against this backdrop provides additional support for adhering to the construction of "described in" that was uniform at the time of the 2003 enactment.

4. The Board's approach gives Section 1101(a)(43) a coherent interpretation, avoiding the "limited and haphazard" patchwork that would result on petitioner's view

a. The interpretation of the aggravated-felony provisions adopted by the Board and most courts of appeals reads the statute in line with the purpose obvious in the text—enabling swift removal of aliens who commit serious crimes, regardless of their jurisdiction of conviction. The purpose of removing aliens who pose a threat to the public by virtue of serious criminal conduct was the through-line in Congress's explanations of the aggravated-felony provision. See H.R. Rep. No. 22, 104th Cong., 1st Sess. 6-7 (1995) (1995 House Report) (explaining that, as a result of past congressional and Executive Branch policies, "many aliens who committed serious crimes were released into American society after they were released from incarceration, where they then continue to pose a threat to those around them"); *Criminal Aliens: Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary (Criminal Aliens I)*, 101st Cong., 1st Sess. 1-3 (1989) (statement of Rep.

Morrison, Chairman). The Board's interpretation of Section 1101(a)(43) is the only sensible understanding of Congress's directive that the serious crimes identified in that section are to be treated as aggravated felonies, "whether in violation of Federal or State law" or whether "in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years." 8 U.S.C. 1101(a)(43). Petitioner's approach, in contrast, would disserve that objective, by carving out from coverage many aliens who are convicted of their serious crimes under state and foreign statutes—merely because the state and foreign statutes lack an interstate-commerce jurisdictional element.

Moreover, petitioner's construction of the "described in" provisions would produce the "limited and * * * haphazard" coverage of state and foreign offenses that this Court has explained Congress would not have intended. *Nijhawan*, 557 U.S. at 40 (rejecting argument that aggravated-felony paragraph covering fraud convictions involving losses greater than $10,000 should be construed to require that loss amount must have been proven to the jury, because of the "limited and * * * haphazard" coverage of fraud provisions that would result); see *United States* v. *Hayes*, 555 U.S. 415, 426 (2009) (relying on similar "[p]ractical considerations" concerning haphazard coverage of state offenses in construing provision pertaining to crimes of domestic violence); *Beasley*, 12 F.3d at 284 (Breyer, J.) (eschewing reading of "described in" language that would create a "crazy-quilt" of statutory coverage, due to disparate treatment of state and federal offenses).

Petitioner would create just that type of patchwork, by reading the aggravated-felony provision to exclude state and foreign convictions for many of the gravest aggravated felonies, while reaching state offenses that, while serious, are less grave by any measure. For instance, state and foreign offenses that petitioner would exclude because Congress exercised its legislative jurisdiction using an interstate-commerce element include all child-pornography-related offenses, including even selling a child for the purpose of child pornography, see 8 U.S.C. 1101(a)(43)(I); receiving explosives for the purpose of use in killing, injuring, or intimidating another, see 8 U.S.C. 1101(a)(43)(E)(i); demanding or receiving a ransom for a kidnapping, see 8 U.S.C. 1101(a)(43)(H); and possessing a firearm following a felony conviction, see 8 U.S.C. 1101(a)(43)(E)(ii). In contrast, on petitioner's view, state and foreign offenses that would qualify as aggravated felonies—because Congress chose not to include an interstate-commerce element—include operating an unlawful gambling business, see 8 U.S.C. 1101(a)(43)(J); 18 U.S.C. 1955; possessing a firearm not identified by a serial number, 26 U.S.C. 5861(i); and possessing a firearm that was unlawfully imported, 26 U.S.C. 5861(k).

Petitioner's approach would generate "limited and * * * haphazard" results, *Nijhawan*, 557 U.S. at 40, in another respect, because his narrow reading of the "described in" provisions excludes crimes more serious than those he acknowledges would be brought within the aggravated-felony provision through paragraphs of Section 1101(a)(43) using different linguistic formulations. Petitioner does not dispute that state and foreign convictions for offenses identified in Sec-

tion 1101(a)(43) using generic labels do qualify as aggravated felonies. And the state offenses undisputedly brought within the aggravated-felony provision as a result include many crimes involving less dangerous conduct than the exceptionally grave offenses that petitioner would read out through his narrow construction of "described in." For instance, aggravated-felony provisions cast in generic terms reach all convictions relating to failure to appear before a court on a felony charge that carried a possible term of at least two years' imprisonment, 8 U.S.C. 1101(a)(43)(T); any fraud involving a loss of $10,000 or more, 8 U.S.C. 1101(a)(43)(M)(i); and any offense relating to managing a prostitution business, 8 U.S.C. 1101(a)(43)(K). In light of the breadth of coverage of Section 1101(a)(43), it is not plausible that Congress intended to exclude state offenses involving child pornography, explosives, arson, and ransom demands, based solely on the absence of the federal statute's jurisdictional element.

b. In an attempt to give coherence to his construction, petitioner suggests (Br. 35-36) that the statute could have reflected an intent to exclude certain state and foreign offenses on the ground that the absence of an interstate-commerce element made persons who commit the state and foreign crimes substantially less culpable than their federal counterparts. But that suggestion misunderstands the role of interstate-commerce jurisdictional elements, and would not make petitioner's statutory reading any less of a crazy quilt.

Because the federal government lacks a general police power, Congress cannot enact laws regulating criminal activity unless the laws are connected to an

enumerated power, such as the Commerce Clause. See, *e.g.*, *Bond* v. *United States*, 134 S. Ct. 2077, 2086-2087 (2014). Accordingly, Congress's decision to proscribe forms of criminal activity when they affect commerce does not reflect a highly idiosyncratic view of when crimes such as child-pornography distribution, unlawful firearms possession, and extortion are sufficiently serious to be proscribed; rather, the interstate-commerce elements in those statutes represent the link Congress prescribed between the substantive offense and the exercise of one of its enumerated powers. And the existence of such an element typically reflects a congressional intent that the statute sweep broadly in its coverage. See, *e.g.*, *Russell*, 471 U.S. at 859 (explaining that in drafting federal arson statute to reach malicious destruction by fire or explosives of "'any building used in any activity affecting interstate or foreign commerce,'" Congress "expresse[d] an intent * * * to exercise its full power under the Commerce Clause") (quoting 18 U.S.C. 844(i)); *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (per curiam) (describing commerce elements as "words of art" that "ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power").

Petitioner is also unable to offer any reason why Congress would have regarded as materially and categorically more serious those crimes that are covered by the aggravated-felony provision as offenses "described in" federal law, based on the interstate-commerce element used as a basis for federal legislative jurisdiction—let alone so much more serious that Congress would have wished to exclude all convictions under the substantively equivalent state and foreign

statutes. He asserts (Br. 35) that Congress could have seen a commercial nexus as related to culpability for felon-in-possession crimes, but offers no account of why Congress would have seen a felon's possession of a firearm as materially more culpable if the firearm was manufactured outside the State of unlawful possession, thereby satisfying the interstate-shipment requirement of 18 U.S.C. 922(g), instead of being manufactured by an in-state gun company. See Pet. Br. 35. Similarly, beyond mere assertion (*ibid.*), petitioner identifies no reason why persons who obtained or sent child pornography over the Internet or through the mail would pose a materially greater danger to children than persons who received or distributed child pornography in person.

The implausibility of petitioner's reading is compounded by the fact that many of the state and foreign offenses petitioner would exclude on his connection-to-interstate-commerce theory are crimes that all but inevitably involve some connection to interstate or foreign commerce in any event, regardless of the jurisdiction of prosecution. It is surely the rare felon who manages to acquire a gun that has never been transported in commerce; the rare blackmailer or ransom-seeker who conveys demands by courier rather than by mail, fax, phone, or the Internet; and the rare distributor or consumer of child pornography who disseminates or acquires child pornography only through in-person transactions. The absence of proof of a commerce connection when those crimes are prosecuted in state or foreign court simply reflects that there was no reason for state or foreign governments (with their plenary police powers) to require findings regarding the connection to commerce that

has relevance to federal legislative jurisdiction. That makes particularly far-fetched petitioner's theory that Congress would have carved out all state and foreign offenses because it saw offenses with some commercial nexus as particularly culpable.

Petitioner's reading, moreover, would generate haphazard coverage even if petitioner were correct that there is some incremental difference in culpability for some offenses depending on whether a connection to interstate commerce is established. Congress included in the aggravated-felony definition many offenses less grave than the most local acts of selling a child for the purpose of child pornography, maliciously destroying property by means of fire or explosives, or demanding a ransom for the release of a kidnapped person. See pp. 33-34, *supra*. Those inclusions cannot be reconciled with petitioner's hypothesis that Congress wanted to exclude exceedingly grave crimes from aggravated-felony coverage because it considered an interstate-commerce showing to have some bearing on culpability.

c. In a similar vein, petitioner speculates (Br. 33-36) that Congress could have intended the "described in" language to exclude state and foreign convictions under statutes that are equivalent to the specified federal statutes except for the absence of an interstate-commerce element because Congress regarded the fact that the particular offender was prosecuted by a state or foreign government as an indication that the conduct leading to conviction was likely to be less serious than the conduct leading to conviction for a substantively equivalent crime in federal court.

But when Congress wanted to capture only particularly serious forms of an offense in the aggravated-

felony provision, it did so explicitly—through formulations that are actually reasonably calculated to get at the most serious forms of the offenses at issue. See, *e.g.*, 8 U.S.C. 1101(a)(43)(D) (offenses "described in" the federal provisions banning money laundering, "if the amount of the funds exceeded $10,000"); 8 U.S.C. 1101(a)(43)(G) (theft and burglary offenses "for which the term of imprisonment [was] at least one year"); 8 U.S.C. 1101(a)(43)(M) (offenses involving fraud or deceit, "in which the loss to the victim or victims exceeds $10,000"); see also 8 U.S.C. 1101(a)(43)(N) and (P) (providing that certain document-fraud and alien-smuggling crimes are aggravated felonies except under certain circumstances when the crimes were committed to aid a family member).

In contrast, the assumption that Congress viewed crimes prosecuted by state authorities as characteristically less serious is contrary to basic principles of federalism. States are the sovereigns in the federal framework that are principally entrusted with the responsibility for punishing criminal activity—including the most serious crimes. See *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993) ("States possess primary authority for defining and enforcing the criminal law.") (quoting *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982)); see also, *e.g.*, *Bond*, 134 S. Ct. at 2086-2087; *United States* v. *Kebodeaux*, 133 S. Ct. 2496, 2513 (2013). In keeping with that principle, even when federal jurisdiction exists, longstanding principles establish that it is generally appropriate for federal prosecutors to decline prosecution of any person who "is subject to effective prosecution in another jurisdiction." Offices of the U.S. Att'ys, *U.S. Attorneys' Manual: Principles of Federal Prosecution* § 9-27.240

(1997) (*U.S. Attorneys' Manual*), http://www.justice.gov/usam/united-states-attorneys-manual. Federal prosecutors are directed to make that determination based on considerations such as whether the state or local jurisdiction "has the prosecutorial and judicial resources necessary to undertake prosecution promptly and effectively," whether the crime was principally investigated by state or local authorities, whether a state or local jurisdiction has a particularly strong interest in the crime at hand, and what sentence is likely to be imposed in a state or local prosecution—rather than to take control of the most serious cases. *Ibid.*

Indeed, treating prosecution by state authorities as a proxy for less dangerous conduct would be particularly inappropriate in the context of arson and explosives crimes. When Congress first enacted what is now the arson and explosives statute—initially making it a crime to maliciously damage or destroy property only by means of explosives—Congress took the unusual step of expressly disclaiming any intent to displace state prosecutions, see 18 U.S.C. 848, through a provision long understood "as a statement of congressional intent that the Federal government—absent a specific Federal interest—will not become involved in bombing matters that can be adequately investigated and prosecuted by local authorities," *U.S. Attorneys' Manual* § 9-63.902; see Act of Oct. 15, 1970, Pub. L. No. 91-452, Tit. XI, § 1102, 84 Stat. 952. And when Congress subsequently amended Section 844(i) to reach malicious destruction of property through fire, members of Congress explained that this principle of restraint would remain in force. They noted that "[p]rimary responsibility" for investigating and prose-

cuting arson offenses "will remain with State and local law enforcement." 128 Cong. Rec. 18,814 (1982) (statement of Rep. Hughes); accord *id.* at 18,816 (statement of Rep. Moffett). While federal agents were expected to play a role in investigations "[b]ecause the investigation of arson crimes frequently requires expertise and technology which far surpasses the abilities of State and local governments to respond," *id.* at 18,815 (statement of Rep. McClory), the federal role was expected to principally involve providing support to States, see, *e.g.*, *id.* at 19,155 (statement of Rep. Heckler); *Anti-Arson Act of 1982: Hearing on H.R. 6377 and H.R. 6454 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 14 (1982) (statement of Robert Powis, Deputy Assistant Sec'y, Dep't of the Treasury). The federal government was expected to step in only where state and local authorities lacked "jurisdictional authority or sufficient investigative resources to deal actively with arson crimes." *Ibid.* Thus, prosecution by state authorities would be an unusually poor proxy for identifying less serious arson offenses.

Petitioner's hypothesis breaks down entirely in the context of the foreign crimes that Congress expressly provided could constitute aggravated felonies. Prosecution by a foreign sovereign, rather than the United States, would not be a reasonable proxy for identifying the least serious forms of arson, explosives crime, extortion, or similar offenses, because a foreign sovereign's having prosecuted the offense typically would simply reflect the fact that the criminal conduct took place abroad. Thus, as the Board appropriately recognized, petitioner's construction of "described in" makes scant sense in light of the effect that it would

have on foreign convictions. *Vasquez-Muniz*, 23 I. & N. Dec. at 211-212.

Further, the text of the aggravated-felony provision as a whole is not consistent with any coherent objective of excluding state or foreign offenses on offense-seriousness grounds. Congress made plain that it did *not* view state or foreign prosecution as a proxy for offense seriousness, as a general matter, when it clarified by amendment that the aggravated-felony provision should be construed to reach state and certain foreign offenses. 8 U.S.C. 1101(a)(43). And petitioner offers no plausible reason why Congress would have wanted to use state or foreign prosecution as a proxy for seriousness only for an assortment of crimes incorporated in the aggravated-felony provision through "described in" language—thereby excluding from coverage state convictions for exceptionally grave crimes involving child pornography, firearms, explosives and the like.

d. In the end, petitioner shrugs off the haphazard application of the aggravated-felony provision that would result from his view by asserting that many crimes would still furnish grounds for deportation under INA provisions other than those based on conviction of an aggravated felony. Pet. Br. 36-38 (describing provisions allowing Attorney General to initiate removal proceedings on specified other grounds). But that is no justification for a misreading of the aggravated-felony provision itself. Removal based on the non-aggravated-felony grounds to which petitioner points is subject to cancellation on a case-by-case basis, based on discretionary judgments by immigration authorities. See 8 U.S.C. 1229b(a) (giving Attorney General discretion to cancel the removal of an

inadmissible or deportable alien, subject to length-of-residency requirements, but only if the alien "has not been convicted of any aggravated felony"). The aggravated-felony provisions impose more categorical, firm, and expeditious removal standards and procedures, in light of Congress's determination that under the waivable removal grounds, "[t]he government's attempts to deport those aliens committing the most serious crimes ha[d] proved to be ineffective." 1995 House Report 6. Accordingly, petitioner errs in suggesting that Congress might have designed crazy-quilt aggravated-felony coverage simply because immigration authorities might have available alternative grounds that Congress determined to be inadequate when it enacted the aggravated-felony provisions.

5. Legislative history supports the conclusion that Congress intended the aggravated-felony provisions to reach state and foreign offenses without regard to any interstate-commerce jurisdictional element

The legislative history of the aggravated-felony provisions furnishes additional support for the conclusion that Congress sought to provide for swift removal of aliens convicted in any court of the serious substantive crimes covered by the aggravated-felony definition in Section 1101(a)(43), without regard to any interstate-commerce jurisdictional element.

First, in explaining the danger sought to be addressed by the aggravated-felony provisions, Members of Congress focused on the risks posed by criminal aliens in both the federal and state criminal justice systems. Members received testimony from state officials concerning the burden imposed by criminal aliens and cited statistics regarding alien incarceration in state prisons. See S. Rep. No. 48, 104th Cong.,

1st Sess. 1, 9 (1995); H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. 1, at 146-147 (1990) (1990 House Report); *Criminal Aliens: Hearing on H.R. 3872 Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary* (*Criminal Aliens II*), 103d Cong., 2d Sess. 2 (1994) (statement of Rep. Mazzoli, Chairman); *Criminal Aliens I* 6 (statement of Rep. Smith); *Criminal Aliens II* 117-118 (statement of Rep. Schumer); 139 Cong. Rec. E705 (daily ed. Mar. 18, 1993) (statement of Rep. Moorhead); 139 Cong. Rec. 6324 (1993) (statement of Rep. McCollum). No Member appears to have suggested that the government's focus on removing aliens convicted of serious offenses should be on aliens convicted of federal crimes.

Second, Congress enacted the amendment specifying that the aggravated-felony definition encompasses offenses "whether in violation of Federal or State law," or "in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years," 8 U.S.C. 1101(a)(43), in order to ratify the treatment of state convictions set out in *In re Barrett*, 20 I. & N. Dec. 171 (B.I.A. 1990). 1990 House Report 147 (explaining that the amendment reflected "concur[rence] with the recent decision" in *Barrett*). *Barrett*, in turn, expressed an expansive understanding of the aggravated-felony definition's reach.

The Board held in *Barrett* that an alien's state drug-trafficking conviction qualified as an aggravated felony under an early version of the definition that reached only murder, drug-trafficking, and trafficking in firearms or explosives. 20 I. & N. Dec. at 175. In doing so, the Board explained that it understood the

aggravated-felony provisions as directed at particular criminal problems—there, the problem of the drug trade—and found it implausible that in seeking to address such problems, Congress intended to differentiate between convicted aliens "on the basis of whether the conviction was accomplished under state or federal law." *Ibid.* The Board further explained that construction of that aggravated-felony provision should take into account surrounding INA provisions, which generally placed state and federal offenses on equal footing. *Id.* at 175-176. The Board then described the appropriate test for determining whether a state conviction was for a drug-trafficking crime under the INA's aggravated-felony provisions as whether the conviction was under a statute "sufficiently analogous" to the relevant federal drug statutes, *id.* at 175, rather than demanding a precise match. Congress's amendment of the INA to "concur[] with," 1990 House Report 147, or "codify[]" *Barrett's* approach of "[e]xtend[ing] the definition of aggravated felony to include aliens convicted of *like* State crimes," 136 Cong. Rec. 35,621 (1990) (statement of Sen. Graham, lead sponsor) (emphasis added), provides additional support for the conclusion that the INA's aggravated-felony provisions are aimed at ensuring removal of aliens convicted of the most serious crimes in any jurisdiction, without regard to jurisdictional elements.

Finally, the passages in which Members of Congress discussed the INA provisions referring to crimes "described in" federal criminal statutes provide additional support for the prevailing understanding of that aggravated-felony language. Members of Congress routinely described those provisions as

extending aggravated-felony treatment to particular substantive criminal activity (like "child pornography"), without any suggestion that those substantive offenses would be covered only if they were in violation of federal law. See, *e.g.*, *Criminal Aliens II* 112 (statement of Rep. Smith), 132 (statement of Rep. Hunter), 134 (statement of Rep. Lehman); 139 Cong. Rec. at 6324 (statement of Rep. McCollum).

B. Any Ambiguity Should Be Resolved By Deferring To The Board's Reasonable Interpretation

As explained above, the text, structure, and history of the INA's aggravated-felony provisions establish that an alien is removable for a crime "described in" the federal arson and explosives statute when convicted of violating a state statute that is equivalent to the federal provision except for the absence of an interstate-commerce element. To the extent that any ambiguity remains, however, deference to the Board's construction of the INA's aggravated-felony provisions is warranted, because the deference principles of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), are applicable, and the Board's construction of that text in the INA is reasonable.

1. Principles of Chevron *deference apply*

a. "Principles of *Chevron* deference apply when the BIA interprets the immigration laws." *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion) (citing *Chevron*, 467 U.S. at 842-844); *id.* at 2214-2216 (Roberts, C.J., concurring in the judgment); see *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009); *Immigration & Naturalization Serv.* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999). Those holdings by this Court reflect the INA's express direction

that "[t]he Attorney General shall be charged with the administration and enforcement" of the INA with respect to the adjudication of removal proceedings[5] and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." *Aguirre-Aguirre*, 526 U.S. at 424 (quoting 8 U.S.C. 1103(a)(1)). Because the Attorney General has vested her adjudicative and interpretive authority in the Board (while retaining ultimate authority), "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." *Id.* at 425 (citation and internal quotation marks omitted). Accordingly—as courts of appeals have uniformly held—the Board is entitled to deference when it interprets the meaning of the term "aggravated felony" in the INA. See *Soto-Hernandez* v. *Holder*, 729 F.3d 1, 4 (1st Cir. 2013); *Mugalli* v. *Ashcroft*, 258 F.3d 52, 56 (2d Cir. 2001); *Restrepo* v. *Att'y Gen. of the U.S.*, 617 F.3d 787, 795-796 (3d Cir. 2010); *Espinal-Andrades*, 777 F.3d at 169 (4th Cir.); *Alwan* v. *Ashcroft*, 388 F.3d 507, 513-515 (5th Cir. 2004); *Velasco-Giron* v. *Holder*, 773 F.3d 774, 776 (7th Cir. 2014), cert. denied, 135 S. Ct. 2072 (2015); *Spacek* v. *Holder*, 688 F.3d 536, 538 (8th Cir. 2012); *Renteria-Morales* v. *Mukasey*, 551 F.3d 1076, 1081 (9th Cir.

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[5] Other functions relating to immigration and naturalization that were formerly performed by the Immigration and Naturalization Service, or otherwise vested in the Attorney General, have been transferred to officials of the Department of Homeland Security. Accordingly, some residual statutory references to the Attorney General that pertain to the transferred functions are now deemed to refer to the Secretary of Homeland Security. See 6 U.S.C. 251, 271(b), 542 note, 557; 8 U.S.C. 1551 note.

2008); *Balogun* v. *U.S. Att'y Gen.*, 425 F.3d 1356, 1361 (11th Cir. 2005), cert. denied, 547 U.S. 1113 (2006).

b. i. Neither of petitioner's arguments against *Chevron*'s applicability has merit. Petitioner argues (Br. 41-42) that principles of *Chevron* deference do not apply because the INA attaches consequences to certain immigration misconduct under several of the INA's criminal provisions when the misconduct is committed by (or with respect to) aliens previously convicted of aggravated felonies. Petitioner identifies three such crimes (Br. 39). First, 8 U.S.C. 1327 prohibits knowingly assisting in the reentry of an alien who is inadmissible under most of the security-related inadmissibility grounds in the INA, see 8 U.S.C. 1182(a)(3), or who has been convicted of an aggravated felony and is inadmissible under any of the "[c]riminal [or] related grounds" in 8 U.S.C. 1182(a)(2). Second, 8 U.S.C. 1253(a)(1) imposes criminal penalties on many classes of aliens who are subject to final orders of removal but willfully fail or refuse either to depart the country, to present themselves for removal, or to timely acquire necessary travel documents for removal, as well as aliens in those classes who conspire to thwart removal. That crime carries a higher statutory maximum sentence if an alien is subject to an outstanding order of removal based on many grounds in the INA's deportability section (8 U.S.C. 1227(a)): those that relate to "[s]muggling"; "[c]riminal offenses" (including but not limited to the aggravated-felony provisions); "[f]ailure to register and falsification of documents"; or "[s]ecurity." See 8 U.S.C. 1253(a)(1)(D). Finally, 8 U.S.C. 1326, which prohibits an alien from illegally reentering the country following deportation, imposes higher statutory maximum

penalties for, among others, aliens who illegally reenter the country after a deportation "subsequent to a conviction for commission of an aggravated felony," 8 U.S.C. 1326(b)(2), and aliens who illegally reenter following removal based on security and related grounds or pursuant to special terrorist removal procedures, see 8 U.S.C. 1326(b)(3).

This Court has never held that agencies are stripped of deference in construing terms in statutes they administer when those terms might also carry such criminal implications. To the contrary, it has deferred to agency interpretations of terms with such implications. *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 703-704 (1995) (deferring to Secretary of the Interior's definition of the term "take," as used in the provision of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, that makes it unlawful to "take" endangered species); see *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335-1336 (2011) (giving deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), to agencies' consistent views in briefs and manuals concerning the anti-retaliation provision in the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, although "those who violate the antiretaliation provision * * * are subject to criminal sanction"); see also *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997) (deferring to regulation adopted by the Securities and Exchange Commission (SEC) in a criminal case, where the SEC's interpretation was set out in a legislative rule forbidding certain acts).

Petitioner contends (Br. 43) that *O'Hagan* presented distinct deference questions because it involved a statutory provision authorizing the SEC to adopt

regulations proscribing conduct. But that feature of *O'Hagan* simply called for application under *Chevron* of the more deferential arbitrary-and-capricious standard applicable to legislative rules. See 521 U.S. at 673 (quoting *Chevron*, 467 U.S. at 844). *O'Hagan* does not undermine the applicability of standard *Chevron* deference here, where the INA expressly authorizes the Attorney General to "administer and enforce" the INA in the adjudication of removal cases, and gives special force to her interpretations of the Act. 8 U.S.C. 1103(a)(1); see *Aguirre-Aguirre*, 526 U.S. at 424. That statutory framework calls for deference to the Attorney General's interpretations of the INA provisions she is charged with administering.[6]

Moreover, petitioner provides no reasonable basis for distinguishing *Sweet Home* or *Kasten*. He acknowledges (Br. 43) that the Court in *Sweet Home* "deferred to an Interior Department regulation" concerning the meaning of a term in the ESA that has criminal applications. But he suggests that the Court did so because "Congress explicitly made it a crime" not only to violate the ESA itself, but also "to violate [Interior Department] regulations." *Ibid.*; see 16 U.S.C. 1540(b)(1) (imposing criminal penalties on "[a]ny person who knowingly violates * * * any regulation issued in order to implement" particular provisions of the ESA). Petitioner identifies no portion of

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[6] In contrast, the Attorney General does not receive *Chevron* deference concerning provisions in the federal criminal code, with applications outside of the immigration context, simply because those provisions are cross-referenced in INA provisions. See, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004) (interpreting "crime of violence" in Title 18 of the United States Code without applying deference principles, in an immigration case).

Sweet Home establishing such a precondition for deference, however—and no portion does so. Instead, the Court held that deference was due to the Secretary's interpretation of the *statutory* term "take" under *Chevron* because the Secretary had taken a reasonable view of that ambiguous term, and "[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation." *Sweet Home*, 515 U.S. at 703. Petitioner similarly cannot account for *Kasten*, which gave weight to agencies' views in construing a provision with criminal applications, as a result of those agencies' civil enforcement powers. 131 S. Ct. at 1335 (citing 29 U.S.C. 216(c) and 5 U.S.C. App. § 1, at 664) (2006)). The Attorney General, and the Board on her behalf, are similarly entitled to deference as they "administ[er] and enforce[]" the admissibility and removal provisions central to their responsibilities, see 8 U.S.C. 1103(a)(1), even if the INA's removal and inadmissibility categories might in some particular cases have some relevance to the INA's criminal penalties for immigration misconduct.

ii. In the alternative, petitioner argues that *Chevron* deference is inapplicable to the INA provision here because if there is any statutory ambiguity, he should prevail under either the rule of lenity applicable to criminal provisions (Br. 39-41), or the proposition that any "lingering ambiguities in deportation statutes" should be construed in favor of the alien (Br. 44) (quoting *Immigration & Naturalization Serv.* v. *St. Cyr*, 533 U.S. 289, 320 (2001)). Petitioner is again incorrect, because those are interpretive rules of last

resort, applicable only if there remains—as the Court has put it with respect to the rule of lenity—"a grievous ambiguity or uncertainty in the language and structure of the Act, * * * such that even after a court has seized everything from which aid can be derived, it is still left with an ambiguous statute." *Chapman* v. *United States*, 500 U.S. 453, 463-464 (1991) (citations, internal quotation marks, and brackets omitted); accord *Maracich* v. *Spears*, 133 S. Ct. 2191, 2209 (2013); see *St. Cyr*, 533 U.S. at 320 (proposition that deportation statutes be construed in alien's favor applies only in the event of "lingering ambiguities"). Because an agency's reasonable construction of a statute is a tool from which aid can be derived in determining the statute's meaning, those canons of last resort cannot override the Board's ability to adopt, under *Chevron*, a "reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best." *Holder* v. *Martinez Gutierrez*, 132 S. Ct. 2011, 2017 (2012).

This Court's decisions demonstrate that the canons petitioner invokes do not usurp the Attorney General's authority to resolve statutory ambiguities. As noted above, *Aguirre-Aguirre* applied *Chevron* deference to the interpretation of the INA's withholding-of-removal provisions, which obviously determine whether an alien will be deported. See 524 U.S. at 424; accord *Martinez Gutierrez*, 132 S. Ct. at 2017 (finding Board's construction of provision concerning relief from deportation was permissible, even if statute was ambiguous); *Negusie*, 555 U.S. at 523-525 (after finding statutory ambiguity, remanding for Board to apply interpretive authority to persecutor bar on withhold-

ing of removal, in case where petitioner had urged that case be decided in his favor based on principle that deportation statutes should be construed in favor of alien); see Pet. Br. at 36, *Negusie* v. *Mukasey*, No. 07-499 (June 16, 2008). Those rulings are contrary to petitioner's position, under which the alien should have prevailed if there was any statutory ambiguity.

2. The Board's interpretation of the aggravated-felony provisions is reasonable

The Board's construction of Section 1101(a)(43) is reasonable under *Chevron*, because it reflects, at minimum, "a permissible construction of the statute." *Mayo Found. for Med. Educ & Research* v. *United States*, 562 U.S. 44, 54 (2011) (quoting *Chevron*, 467 U.S. at 843). As all courts but one have agreed, there is ample support for the Board's view, based on the text; the definition's penultimate sentence regarding state and foreign offenses; the provision regarding early removal of state aggravated-felon offenders, see note 4, *supra*; and the illogical scope of the statute on petitioner's view.

In *Vasquez-Muniz*, the Board emphasized several of these grounds as persuasive. First, the Board emphasized that the penultimate sentence of the aggravated-felony provision, which states that the term "aggravated felony" applies to offenses under state and foreign law, "clearly reflects a concern over substantive offenses rather than any concern about the jurisdiction in which they are prosecuted." 23 I. & N. Dec. at 211. Second, the Board emphasized that a contrary approach would mean "virtually no state crimes would ever be included in" 8 U.S.C. 1101(a)(43)(E), despite an early-removal provision that "clearly contemplates that subparagraph (E) of the aggravated

felony provision encompasses state crimes." 23 I. & N. Dec. at 212 (discussing 8 U.S.C. 1231(a)(4)(B)(ii), which provides for early removal of "an alien in the custody of a State (or a political subdivision of a State)" if, *inter alia*, the alien was not in state custody for a conviction under Section 1101(a)(43)(E), the aggravated-felony provision reaching crimes "described in" the federal arson and explosives statutes). Finally, the Board emphasized that a contrary approach would produce irrational outcomes, particularly by excluding "grave" foreign convictions based on an interstate-commerce element that simply lacked relevance overseas. *Id.* at 211-213.

Petitioner identifies no defects in those three grounds, and while he challenges particular statements in the Board's opinion, those objections misunderstand the Board's reasoning. Petitioner first attacks the Board for having stated that under petitioner's approach, "virtually no state crimes would ever be included in section [1101](a)(43)(E)"—the aggravated felony subsection for firearms and explosives crimes with relevance to early removal. *Vasquez-Muniz*, 23 I. & N. Dec. at 211. Petitioner omits the "section [1101](a)(43)(E)" language when he quotes the Board, and misunderstands this sentence as an assertion that there would be "virtually no" state crimes covered under *any* aggravated-felony provisions. He then asserts (Br. 48) that the Board failed to take into account "all the state offenses referred to by their generic names" as well as "all the state offenses incorporating terms 'defined in' federal statutes." But there are *no* generic offenses or "defined in" references contained in Section 1101(a)(43)(E), which includes only "described in" offenses. 8 U.S.C.

1101(a)(43)(E). And the Board's statement that there would be *virtually* no state crimes covered under Section 1101(a)(43)(E) on the view that petitioner advocates is consistent with the fact that the section would reach state and foreign convictions for a small number of nonviolent firearms and explosives crimes forbidden under federal provisions that contain no interstate-commerce element. See note 4, *supra*.

Petitioner similarly asserts that the Board erred in stating that a "reference to state convictions" for offenses listed under Section 1101(a)(43)(E), in the early-removal provision limited to aliens who were convicted of state crimes, "'would be superfluous' unless the interstate commerce element were ignored." Pet. Br. 48 (quoting 23 I. & N. Dec. at 212; discussing 8 U.S.C. 1231(a)(4)(B)(ii)). Petitioner suggests (*ibid.*) that this statement was in error because a small number of convictions would be covered—"convictions under several statutes that do not include interstate commerce elements." But the Board made clear that it understood that the number of state offenses that would be covered under petitioner's view was not zero—it was just exceedingly small. See *Vasquez-Muniz*, 23 I. & N. Dec. at 212 (stating that "*virtually* no state crimes" would be covered under Section 1101(a)(43)(E)) (emphasis added).

Third, without quotation, petitioner (Br. 48) asserts that the Board overstated the impact on foreign offenses of the statutory construction he urges by holding, in petitioner's description, that "the penultimate sentence's reference to foreign convictions would be a nullity unless the interstate commerce element is ignored." But the Board did not incorrectly conclude that petitioner's reading would exclude *all* foreign

convictions. Rather, it correctly reasoned that "[*a*] *number of* grave offenses" set out in the "described in" provisions "would be found to have no foreign counterpart," such as "smuggling aliens through Canada," "issuing ransom demands for hostages in Mexico, or stockpiling explosives materials in France." *Vasquez-Muniz*, 23 I. & N. Dec. at 213 (emphasis added). And the Board found it "unreasonable to assume that Congress intended to exclude" offenses such as those based on the absence of a jurisdictional element. *Ibid.* That reasoning does not reflect an erroneous view that no foreign offenses at all would be covered on petitioner's theory.

Petitioner fares no better in his assertion (Br. 49) that the Board is not due deference because it changed its views with insufficient explanation. See *Vasquez-Muniz*, 23 I. & N. Dec. at 208 (explaining that after the Ninth Circuit reached a ruling contrary to its own, the Board reversed course "upon a close examination of the statute"). The Board set out the reasons for its change, by issuing a published opinion explaining the features of the statute on which it was relying and the reasons why it found those features relevant. This Court has never required more. The interpretation in *Vasquez-Muniz* has been followed by the Board, and sustained by all but one court of appeals, ever since. It should be upheld by this Court as well.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2015

APPENDIX

1. 8 U.S.C. 1101 provides, in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[5] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[5] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

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[5] So in original. Probably should be preceded by "is"

(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assist-

ing, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter[6]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a wit-

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[6] So in original. Probably should be followed by a semicolon.

ness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

* * * * *

2. 8 U.S.C. 1182 provides, in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice

Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h) of this section.

(G) Foreign government officials who have committed particularly severe violations of religious freedom

Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe viola-

tions of religious freedom, as defined in section 6402 of title 22, is inadmissible.

(H) Significant traffickers in persons

(i) In general

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of title 22, is inadmissible.

(ii) Beneficiaries of trafficking

Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering

Any alien—

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

(3) Security and related grounds

(A) In general

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in—

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the

Government of the United States by force, violence, or other unlawful means,

is inadmissible.

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi) (III), unless the

alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) Exception

Subclause (IX) of clause (i) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) "Terrorist activity" defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) "Engage in terrorist activity" defined

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) "Representative" defined

As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) "Terrorist organization" defined

As used in this section, the term "terrorist organization" means an organization—

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secre-

tary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(C) Foreign policy

(i) In general

An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) Exception for officials

An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens

An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

* * * * *

(D) Immigrant membership in totalitarian party

(i) In general

Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) Exception for involuntary membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that—

(I) the membership or affiliation terminated at least—

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members

The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

(i) Participation in Nazi persecutions

Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide

Any alien who ordered, incited, assisted, or otherwise participated in genocide, as defined in section 1091(a) of title 18, is inadmissible.

(iii) Commission of acts of torture or extrajudicial killings

Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of—

(I) any act of torture, as defined in section 2340 of title 18; or

(II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note),

is inadmissible.

(F) Association with terrorist organizations

Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.

(G) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, is inadmissible.

* * * * *

3. 8 U.S.C. 1227 provides in pertinent part:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status

* * * * *

(E) Smuggling

(i) In general

Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits

under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

* * * * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the

criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate—

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title,

is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is de-

portable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than

support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

(3) Failure to register and falsification of documents

(A) Change of address

An alien who has failed to comply with the provisions of section 1305 of this title is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(B) Failure to register or falsification of documents

Any alien who at any time has been convicted—

(i) under section 1306(c) of this title or under section 36(c) of the Alien Registration Act, 1940,

(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.), or

(iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of title 18 (relating to fraud and misuse of visas, permits, and other entry documents),

is deportable.

(C) Document fraud

(i) In general

An alien who is the subject of a final order for violation of section 1324c of this title is deportable.

(ii) Waiver authorized

The Attorney General may waive clause (i) in the case of an alien lawfully admitted for permanent residence if no previous civil money penalty was imposed against the alien under section 1324c of this title and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.

(D) Falsely claiming citizenship

(i) In general

Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any Federal or State law is deportable.

(ii) Exception

In the case of an alien making a representation described in clause (i), if each natural parent of the alien (or, in the case of an adop-

ted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such representation.

(4) Security and related grounds

(A) In general

Any alien who has engaged, is engaged, or at any time after admission engages in—

(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other criminal activity which endangers public safety or national security, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is deportable.

(B) Terrorist activities

Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) of this title is deportable.

(C) Foreign policy

(i) In general

An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.

(ii) Exceptions

The exceptions described in clauses (ii) and (iii) of section 1182(a)(3)(C) of this title shall apply to deportability under clause (i) in the same manner as they apply to inadmissibility under section 1182(a)(3)(C)(i) of this title.

(D) Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

Any alien described in clause (i), (ii), or (iii) of section 1182(a)(3)(E) of this title is deportable.

(E) Participated in the commission of severe violations of religious freedom

Any alien described in section 1182(a)(2)(G) of this title is deportable.

(F) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, is deportable.

* * * * *

4. 8 U.S.C. 1229b provides, in pertinent part:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

* * * * *

5. 8 U.S.C. 1231 provides, in pertinent part:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal or aliens ordered removed

* * * * *

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a)[1] of title 42 and paragraph (2),[2] the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent of-

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[1] See References in Text note below.

[2] So in original. Probably should be "subparagraph (B),"

fense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title[3] and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

* * * * *

6. 8 U.S.C. 1253(a) provides, in pertinent part:

Penalties related to removal

(a) Penalty for failure to depart

(1) In general

Any alien against whom a final order of removal is outstanding by reason of being a member of

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[3] So in original. Probably should be followed by a closing parenthesis.

any of the classes described in section 1227(a) of this title, who—

(A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court,

(B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,

(C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or

(D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order,

shall be fined under title 18, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1227(a) of this title), or both.

(2) Exception

It is not a violation of paragraph (1) to take any proper steps for the purpose of securing cancellation of or exemption from such order of removal or for the purpose of securing the alien's release from incarceration or custody.

* * * * *

7. 8 U.S.C. 1326 provides, in pertinent part:

Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

* * * * *

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such

alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[1] or

* * * shall be fined under title 18, imprisoned for not more than 10 years, or both.

* * * * * *

8. 8 U.S.C. 1327 provides:

Aiding or assisting certain aliens to enter

Any person who knowingly aids or assists any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony) or 1182(a)(3) (other than subparagraph (E) thereof) of this title to enter the United States, or who connives or conspires with any person or persons to allow, procure, or permit any such alien to enter the United States, shall be fined under title 18, or imprisoned not more than 10 years, or both.

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[1] So in original. The period probably should be a semicolon.

9. 18 U.S.C. 81 provides:

Arson within special and maritime jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, willfully and maliciously sets fire to or burns any building, structure or vessel, any machinery or building materials or supplies, military or naval stores, munitions of war, or any structural aids or appliances for navigation or shipping, or attempts or conspires to do such an act, shall be imprisoned for not more than 25 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed, or both.

If the building be a dwelling or if the life of any person be placed in jeopardy, he shall be fined under this title or imprisoned for any term of years or for life, or both.

10. 18 U.S.C. 844 provides, in pertinent part:

Penalties

* * * * *

(d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties

as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

(e) Whoever, through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce, willfully makes any threat, or maliciously conveys false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive shall be imprisoned for not more than 10 years or fined under this title, or both.

(f)(1) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to, the United States, or any department or agency thereof, or any institution or organization receiving Federal financial assistance, shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both.

(2) Whoever engages in conduct prohibited by this subsection, and as a result of such conduct, directly or proximately causes personal injury or creates a substantial risk of injury to any person, including any public

safety officer performing duties, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both.

(3) Whoever engages in conduct prohibited by this subsection, and as a result of such conduct directly or proximately causes the death of any person, including any public safety officer performing duties, shall be subject to the death penalty, or imprisoned for not less than 20 years or for life, fined under this title, or both.

(g)(1) Except as provided in paragraph (2), whoever possesses an explosive in an airport that is subject to the regulatory authority of the Federal Aviation Administration, or in any building in whole or in part owned, possessed, or used by, or leased to, the United States or any department or agency thereof, except with the written consent of the agency, department, or other person responsible for the management of such building or airport, shall be imprisoned for not more than five years, or fined under this title, or both.

(2) The provisions of this subsection shall not be applicable to—

(A) the possession of ammunition (as that term is defined in regulations issued pursuant to this chapter) in an airport that is subject to the regulatory authority of the Federal Aviation Administration if such ammunition is either in checked baggage or in a closed container; or

(B) the possession of an explosive in an airport if the packaging and transportation of such explosive is exempt from, or subject to and in accordance with, regulations of the Pipeline and Hazardous Materials

Safety Administration for the handling of hazardous materials pursuant to chapter 51 of title 49.

(h) Whoever—

(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States,

including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 20 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including

any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

* * * * *

11. 18 U.S.C. 848 provides:

Effect on State law

No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

12. New York Penal Law 110.00 provides:

Attempt to commit a crime

A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

13. New York Penal Law 150.10 provides:

Arson in the third degree

1. A person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion.

2. In any prosecution under this section, it is an affirmative defense that (a) no person other than the defendant had a possessory or proprietary interest in the building or motor vehicle, or if other persons had such interests, all of them consented to the defendant's conduct, and (b) the defendant's sole intent was to destroy or damage the building or motor vehicle for a lawful and proper purpose, and (c) the defendant had no reasonable ground to believe that his conduct might endanger the life or safety of another person or damage another building or motor vehicle.

Arson in the third degree is a class C felony.